Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARTZELL PROPELLER, INC.,
Petitioner,

v.

GAYNELL REYNO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

[Consolidated for Argument with No. 80-848]

REPLY BRIEF FOR PETITIONER HARTZELL PROPELLER, INC.

WARNER W. GARDNER *
NANCY J. BREGSTEIN
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

RONALD C. SCOTT
ADRIAN J. GORDON
KRUSEN EVANS AND BYRNE
500 Public Ledger Building
Philadelphia, Pennsylvania 19106
(215) 923-4400

Attorneys for Petitioner, Hartzell Propeller, Inc.

* Counsel of record

KRUSEN EVANS AND BYRNE
SHEA & GARDNER
Of Counsel

August 14, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. MATTERS NOT IN ISSUE	1
II. THE WRIT WAS NOT IMPROVIDENTLY GRANTED	3
III. RESPONDENT HAS NO RIGHT TO THE FORUM WHERE SHE EXPECTS TO MAXIMIZE HER PROSPECTS OF RECOVERY	5
IV. THE COURTS OF THE UNITED KINGDOM CONSTITUTE AN APPROPRIATE ALTERNATIVE FORUM FOR THIS LITIGATION	10
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Abouchalache v. *Hilton International Co.*, 464 F. Supp. 94 (S.D.N.Y. 1978), *aff'd mem.*, 628 F.2d 1344 (2d Cir. 1980) 9

Alwataary General Trading & Agricultural Development Co. v. *M.V. Sounion*, No. 80 Civ. 5374 (S.D.N.Y. June 12, 1981) 10

Calavo Growers of California v. *Generali Belgium*, 632 F.2d 963 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 871 (1981) 12

Canada Malting Co. v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932) 2, 12, 15

Dahl v. *United Technologies Corp.*, 472 F. Supp. 696 (D. Del. 1979), *aff'd*, 632 F.2d 1027 (3d Cir. 1980) 9, 11, 12, 16

Danser v. *Firestone Tire & Rubber Co.*, 86 F.R.D. 120 (S.D.N.Y. 1980) 9, 13

Davis v. *Passman*, 442 U.S. 228 (1979) 14

DeMateos v. *Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) 3, 4, 5

DeSairigne v. *Gould*, 83 F. Supp. 270 (S.D.N.Y.), *aff'd*, 177 F.2d 515 (2d Cir. 1949), *cert. denied*, 339 U.S. 912 (1950) 9

Erie Railroad v. *Tompkins*, 304 U.S. 64 (1938) 4

Ferne v. *Chadderton*, 363 Pa. 191, 69 A.2d 104 (1949) 14

Fitzgerald v. *Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976) 9

Grodinsky v. *Fairchild Industries, Inc.*, 507 F. Supp. 1245 (D. Md. 1980) 9, 11, 13

Gulf Oil Corp. v. *Gilbert*, 330 U.S. 501 (1947) ..... *passim*

Haddigan v. *Harkins*, 441 F.2d 844 (3d Cir. 1970) 14

Hoffman v. *Blaski*, 363 U.S. 335 (1960) 11

Karr v. *Sixt*, 146 Ohio St. 2d 527, 67 N.E.2d 331 (1946) 14

Keaton v. *Ribbeck*, 58 Ohio St. 2d 443, 391 N.E.2d 307 (1979) 14

Kennedy v. *Byers*, 107 Ohio St. 90, 140 N.E. 630 (1923) 14

Klaxon Co. v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941) 4

TABLE OF AUTHORITIES—Continued

	Page
Michell v. *General Motors Corp.*, 439 F. Supp. 24 (N.D. Ohio 1977)	8
Phoenix Canada Oil Co. v. *Texaco, Inc.*, 78 F.R.D. 445 (D. Del. 1980)	9
Prince v. *Adams*, 229 Pa. Super. 150, 324 A.2d 358 (1974)	14
Reavis v. *Gulf Oil Corp.*, 85 F.R.D. 666 (D. Del. 1980)	9
Rubeck v. *Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978)	14
Sea-Land Services, Inc. v. *Gaudet*, 414 U.S. 573 (1974)	13, 14
Schertenleib v. *Traum*, 589 F.2d 1156 (2d Cir. 1978)	9, 11
Spangler v. *Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 153 A.2d 490 (1959)	14
Soares v. *McClosky*, 466 F. Supp. 703 (E.D. Pa. 1979)	14
The Bremen v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972)	7
United States v. *Memphis Cotton Oil Co.*, 288 U.S. 62 (1933)	14
Van Dusen v. *Barrack*, 376 U.S. 612 (1964)	5
Statutes:	
The Jones Act, 46 U.S.C. § 688 (1976)	3
28 U.S.C. § 1404(a) (1976)	11
Ohio Rev. Code Ann. § 2125.02 (1976)	13, 14
42 Pa. Cons. Stat. Ann. § 8301 (Purdon) formerly Pa. Stat. Ann. Tit. 12, §§ 1601-02 (Purdon))	13
Lord Campbell's Act	13
Damages (Scotland) Act 1976 §§ 1(4), 4, 10	13, 14
Other Authorities:	
Currie, *Change of Venue and the Conflict of Laws*, 22 U. Chi. L. Rev. 405 (1965)	6-7
Dodson, "United Kingdom," in *Product Liability: A Manual of Practice in Selected Nations* (1981)	11

TABLE OF AUTHORITIES—Continued

	Page
Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960)	15
W. Prosser, *Law of Torts* § 127 (4th ed. 1971)	13
H. Tebbens, *International Product Liability* (1979)	8
The Law Commission and the Scottish Law Commission, *Liability for Defective Products* (1975)	14, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-883

HARTZELL PROPELLER, INC.,
Petitioner,

v.

GAYNELL REYNO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

[Consolidated for Argument with No. 80-848]

REPLY BRIEF FOR PETITIONER HARTZELL PROPELLER, INC.

I

MATTERS NOT IN ISSUE

Respondent does not challenge or even address the greater part of petitioner Hartzell's principal brief (hereinafter "Hz. Br. ——").[1] We find no dispute of the following specific points:

---

[1] Petitioner Hartzell did not consent to the filing of either of the two briefs *amicus curiae* that have been filed, and does not share some of the views expressed in the brief filed by the *amici* in support of petitioners.

1. Respondent does not contest that at common law and in admiralty a *forum non conveniens* dismissal was not barred by the prediction that the alternative forum would apply law less favorable to the plaintiff [Hz. Br. 19-23]. Indeed neither *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932), nor the numerous cases and articles supporting its result, are so much as mentioned by respondent.

2. Respondent voices no disagreement with the proposition that *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), requires a discretionary balancing of *all* factors relating to the convenience of the litigation [Hz. Br. 24-27]. Indeed, she considers it useful at one point to urge this point herself [Resp. Br. 18].[2]

3. The settled rule that the district court may be reversed only for abuse of discretion [Hz. Br. 11-13] receives no adverse comment by respondent.

4. There is no dispute, but rather agreement [Resp. Br. 20, 24], that the real parties plaintiff are foreign [see Hz. Br. 14-15].

5. Apart from her claim that the Court of Appeals' decision on choice of law is beyond review [see, *e.g.*, Resp. Br. 7, 17-18], respondent makes no effort to justify in state law the intuition of the Court of Appeals as to the "governmental interests" of Pennsylvania or Ohio [Hz. Br. 35-44].

6. Finally, respondent does not disclaim but expressly acknowledges that she brought suit in the United States because she wished to take advantage of the usual American rule of strict liability and because she believes that in this country "monetary judgments tend to be considerably higher" [Resp. Br. 24-25; see Hz. Br. 44-48].

---

[2] Her argument [Resp. Br. 19-26] as to the controlling effect of the plaintiff's choice of forum is, of course, inconsistent with the discretionary evaluation of all factors mandated by *Gilbert*.

We turn, accordingly, to the few points that respondent *has* put in issue.

II

THE WRIT WAS NOT IMPROVIDENTLY GRANTED

Respondent's suggestion that the writ of certiorari should be dismissed as improvidently granted seems to reflect a desire to avoid an adverse judgment that is plainly warranted on the merits. The reasoning supporting the suggestion is by no means clear, but seems to be that the decision below "rests on choice of law" [Resp. Br. 7, 15]. Respondent states that "[w]hether or not a plantiff might defeat a motion to dismiss on the ground of forum non conveniens because the law of an alternative forum is less favorable to her cause of action than the law of the forum hearing the motion is irrelevant by reason of the choice of law analysis of the Court of Appeals" [*id.* 17].[3] Respondent misreads the opinion below.

Obviously, the Court of Appeals, in holding against dismissal on the ground that it would "work a change

---

[3] Respondent also suggests obliquely that, whatever may be this Court's decision of this case, the holding of *DeMateos* v. *Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978), "still prevails and remains unrepudiated" [Resp. Br. 17; see also *id.* 6]. The point is difficult to understand. In holding as it did, the Court of Appeals followed its prior ruling in *DeMateos* that a dismissal for *forum non conveniens* should not work a change in the applicable law; that is the very ruling now before this Court. (It did not lead to reversal of the *forum non conveniens* dismissal in *DeMateos* because the Third Circuit there agreed with the district court that foreign law would govern wherever the case was tried.) Far from being "as yet unassailed" [Resp. Br. 5], the *DeMateos* ruling (insofar as it is applied to cases not involving the Jones Act, 46 U.S.C. § 688, or other federal statute that is interpreted to confer mandatory federal court jurisdiction, see Hz. Br. 34 n.50), is in square conflict with the rulings of the Second Circuit and is challenged by petitioner herein.

in the applicable law" [A 139], had to conclude or accept that the United States court would indeed apply different law than would a Scottish court.[4] Here, it determined that whereas "Scotland probably would apply its own law to all claims" [A 139], "American" law would govern if the suit were tried here [A 139-156].[5] Thus, the Court of Appeals followed its earlier statement in *DeMateos* "that a dismissal for forum non conveniens, like a statutory transfer, 'should not, despite its convenience, result in a change in the applicable law,'" and squarely held: "Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified."[6]

The principle that dismissal for *forum non conveniens* will not be permitted if it deprives the plaintiff of "the

---

[4] The actual order of the Court of Appeals' analysis does not determine whether one or another of its component steps is properly characterized as "holding" or "dictum". In essence the Court of Appeals held that (a) if there may be a change in law there can be no dismissal [A 139-140] and (b) here, there would be such a change in law [A 144-149, 152-155]. The court might just as well have said (a) there would be a change in law, so (b) there could be no dismissal. The change in law ruling is equally necessary to the decision whether stated first or last.

[5] We have shown in our opening brief that the ruling below both was patently wrong as to the Pennsylvania choice of law and was derived in violation of the deference to state law required by *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). If the Court of Appeals had concluded that Scots law would be applied by the Pennsylvania as well as by the Scottish courts, it would not have had occasion to apply the erroneous principle that dismissal may not be granted if a change in law would result.

[6] A 139-140 (footnote omitted) (quoting *DeMateos* v. *Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978)).

benefit of the claim to which she is entitled here" [A 140] thus was essential to the Court of Appeals' decision. Respondent's suggestion that "the full record . . . does not reflect an adequate presentation of the question upon which certiorari was granted" [Resp. Br. 16] is frivolous.[7]

III

RESPONDENT HAS NO RIGHT TO THE FORUM WHERE SHE EXPECTS TO MAXIMIZE HER PROSPECTS OF RECOVERY

There runs through respondent's arguments a conviction that the judicial system can operate fairly only when it produces the maximum prospect of recovery for the plaintiff and the largest liability for the defendant. We, to the contrary, have supposed as a general proposition that the judicial system is supposed to be neutral as between plaintiff and defendant. We submit that none of respondent's arguments for the virtual inviolability of her choice of forum could appeal to a neutral tribunal.

1. It must be remembered, despite the complexity of the opinion below, that this is a very simple case. The

---

[7] It also contradicts respondent's earlier position in this Court. When she filed her brief in opposition to the petition for certiorari, respondent unequivocally stated [Br. in Opp. 4-5 (emphasis added)]:

> "The Court of Appeals reversed the District Court and *held* that a dismissal by the American court would result in a change of applicable law, *the very prospect of such a change and its consequences thereby precluding dismissal.*
>
> * * * *
>
> "This holding was initially enunciated in *DeMateos* v. *Texaco, Inc.*, which reflected the landmark decision of *Van Dusen* v. *Barrack* by this Court that a transfer under 28 U.S.C. § 1404(a) should not work a change in applicable law as determined by the transferor court."

accident occurred in Scotland. All the real parties plaintiff are Scottish. Three defendants concerned with the maintenance and operation of the aircraft can be sued only in the United Kingdom and already are being pursued there by the relatives of the decedents whose estates respondent represents. Witnesses as to the maintenance of the aircraft and the inexperience of the pilot, and the wreckage itself, are not subject to the process of an American court. We urge that according to common sense and elemental fairness this cannot be anything but a Scottish case, and that the Court of Appeals lost sight of simple basics in the complexity of its analysis.

2. We do not dispute the presumption that attaches to a plaintiff's choice of forum, especially his home forum. This has consistently been recognized from *Gilbert* onward. But under the traditional approach this presumption is greatly weakened when the plaintiff is a foreigner who has journeyed to the forum to seek expected litigation benefits her own country does not provide [Hz. Br. 15].[8] The presumption favoring the plaintiff's choice has, moreover, largely been eroded, whether the plaintiff is American or foreign, in the more recent decisions of three Circuits [see *id.* 16-17].

But respondent's position is even more fundamentally flawed. The traditional deference accorded a plaintiff's choice of forum has never been intended to guarantee a plaintiff, or preserve for his benefit, his selection of the law that will govern the case. As Professor Currie has stated, "one of the prime considerations in forum-shopping has always been the search for a more favorable law, and one of the grounds for invoking the doctrine of *forum non conveniens* has always been that the plaintiff, in the choice of the forum, sought to obtain an inequitable advantage in terms of the law which the forum would apply." Currie, *Change of Venue and the Con-*

[8] The sum of respondent's answer on this point [Resp. Br. 20 n.12] is a quotation from the opinion of the Court of Appeals.

flict of Laws, 22 U. Chi. L. Rev. 405, 444 (1965). The advantage, usually allowed to the plaintiff, is deemed inequitable once the court has determined that the criteria for dismissing for *forum non conveniens* are satisfied, for such a determination essentially signifies that the plaintiff has misused the privilege of forum selection by choosing a forum outside the range of appropriate forums. *Cf.* Hz. Br. 21-22 n.32.

There is no merit, therefore, to the notion that a dismissal that may lead to the application of law less favorable to the plaintiff is precluded on the ground that it will deprive the plaintiff of an advantage, in terms of available causes of action or otherwise, to which she is "rightfully entitled" [Resp. Br. 25]. To characterize the advantage in such terms is to beg the question. There exists no such unqualified "right" of forum selection, or else there would be no doctrine of *forum non conveniens* at all.

3. Respondent attempts to buttress her argument in favor of an unreviewable right to sue wherever she sees fit by claiming that such a rule would have the "desirable" effect of holding the defendant to the highest possible standard of accountability [Resp. Br. 7, 23]. There are at least three answers to this contention, each sufficient.[9]

First: It is for Scotland to determine the standards that should govern liability to Scots arising out of an accident occurring in Scotland.

---

[9] This Court already has indicated its lack of sympathy for respondent's related claim that a plaintiff somehow is entitled to the most favorable odds for the highest monetary judgment [Resp. Br. 25]. See *Gilbert*, 330 U.S. at 510. So, too, it has recorded serious doubts about the chauvinistic view that our own laws are always superior to those of other nations and must therefore always be applied. See, *e.g.*, *The Breman* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

Second: If, as respondent charges, petitioners have not followed "competent and careful manufacturing practices" [Resp. Br. 24], then they will be liable under Scots law of negligence and will be held accountable in a Scottish court.[10]

Third: As we have shown [Hz. Br. 37-42], the Court of Appeals plucked out of thin air the concept that Pennsylvania and Ohio have adopted the principle of strict liability in order to discipline their local producers into safe manufacture [A 147-49]. Respondent adopts the same unsubstantiated premise. In fact, the courts of those states consider that the doctrine of strict liability was adopted in order to compensate the injured consumer who lives or is injured in the state [Hz. Br. 38-42]. But even if we were to assume that the prospect of strict liability induces greater manufacturing care, ample incentive for United States manufacturers to conform to the highest standard is provided by the fact that they will be open to strict liability in cases arising out of accidents occurring in this country. There is neither a shred of evidence in the record nor indeed any reason to believe the allegations of *amicus curiae* that American aircraft manufacturers produce substandard goods for foreign distribution.[11] Indeed, an aircraft manufacturer does not know where its products eventually will be used, and may expect them to fly over numerous jurisdictions (many of which adhere to strict liability). Such a manufacturer would have no reason for or way of "designing and producing different [products] for its different geographical markets." [12]

---

[10] See the affidavit of Ronald Ian Kerr MacLeod [A 18]: "Upon proof of negligence full damages will follow." See also, *e.g.*, H. Tebbens, *International Product Liability* 49-53 (1979).

[11] See Brief for Amicus Curiae Law Offices of Gerald C. Sterns 8, 15.

[12] *Michell* v. *General Motors Corp.*, 439 F. Supp. 24, 27 n.5 (N.D. Ohio 1977); see Hz. Br. 42.

4. Respondent's final point is that an especially strong showing is required in support of a *forum non conveniens* motion when suit has been brought on the defendant's "home turf" and where the defendant's economic capabilities are "disproportionately greater" than the plaintiff's [Resp. Br. 22-23]. We have no doubt that these are legitimate factors for a district court's consideration, along with all of the others enumerated in *Gilbert*, but we have no less doubt that these factors are not dispositive. They were not so treated in either of the cases cited by respondent,[13] or in any of the numerous cases in which *forum non conveniens* motions have been granted notwithstanding that the United States defendants (usually corporate) were sued on their "home turf."[14]

In any event, petitioner Hartzell has made whatever showing would be required to outweigh the fact of residence in the forum jurisdiction.[15] Respondent treats the issue as if "convenience" were a simple matter of how far the defendant has to walk to the courtroom, such that suit in the defendant's "home" jurisdiction almost by definition cannot be "inconvenient". But this is not what is at issue on a *forum non conveniens* motion. As

---

[13] *Reavis* v. *Gulf Oil Corp.*, 85 F.R.D. 666 (D. Del. 1980); *Phoenix Canada Oil Co.* v. *Texaco, Inc.*, 78 F.R.D. 445 (D. Del. 1978).

[14] *E.g.*, *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980); *Schertenleib* v. *Traum*, 589 F.2d 1156 (2d Cir. 1978); *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *Grodinsky* v. *Fairchild Indus., Inc.*, 507 F. Supp. 1245 (D. Md. 1981); *Danser* v. *Firestone Tire & Rubber Co.*, 86 F.R.D. 120 (S.D.N.Y. 1980); *Abouchalache* v. *Hilton Int'l Co.*, 464 F. Supp. 94 (S.D.N.Y. 1978), *aff'd mem.*, 628 F.2d 1344 (2d Cir. 1980); *DeSairigne* v. *Gould*, 83 F. Supp. 270 (S.D.N.Y.), *aff'd*, 177 F.2d 515 (2d Cir. 1949), *cert. denied*, 339 U.S. 912 (1950).

[15] In fact Hartzell, as opposed to Piper, neither is incorporated nor has its principal place of business in Pennsylvania.

we have shown (*supra* pp. 5-6), this is a Scottish case, brought by Scots because of a Scottish accident. Petitioners here will be severely prejudiced by their inability to join the owner, operator, or pilot of the aircraft in any suit brought in a United States court, or to have compulsory process in respect of Scottish evidence, in a case in which there are serious allegations and evidence of faulty maintenance and pilot error [A 97, 100-102, 108-112, 115-116]. See *Alwataary General Trading & Agricultural Development Co.* v. *M.V. Sounion*, No. 80 Civ. 5374 (S.D.N.Y. June 12, 1981). We find no element of fairness in a tactic, now endorsed by the court below, that subjects petitioners to the risk that a jury will find them liable while leaving outside the courtroom and beyond the jury's view all of the defendants more immediately involved in the accident and all of the United Kingdom witnesses and evidence. It is in this sense that the concept of "convenience" must be evaluated; and it is evident that the mere fact that one of the two United States defendants is located in Pennsylvania pales in comparison to the factors favoring trial in Scotland.

IV

THE COURTS OF THE UNITED KINGDOM CONSTITUTE AN APPROPRIATE ALTERNATIVE FORUM FOR THIS LITIGATION

It has been a well-settled proposition, at least since *Gilbert*, that "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process . . . ." *Gilbert*, 330 U.S. at 506-07 (quoted in Resp. Br. 26; Hz. Br. 23). *Gilbert* says no more, however, than that there must be an alternative forum "in which the defendant is amenable to process"; there is no doubt that such is the case here.[16] Respondent (or the

[16] *Amicus* Sterns has suggested, Brief at 16-18, that Scotland may not be a "viable alternative forum" because of an unsupported

estates she represents) *is* "assured of [a] day in court" [Resp. Br. 26].

Respondent would translate *Gilbert's* requirement into one of "an adequate remedy and law," measured by a comparative inquest into the rights, remedies, and pro-

---

allegation that "the availability of Scotland as an alternative forum is dependent on some future act of acquiescence . . . by defendants." From this unsupported premise *amicus* Sterns reasons to the conclusion, drawn by analogy from 28 U.S.C. § 1404(a) (1976) and this Court's construction of that statute in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), that an alternative forum does not exist because jurisdiction over petitioners in Scotland exists only by their consent. Our answer is two-fold:

As a matter of fact, there is absolutely nothing in the record in this case indicating that the Scottish courts would not assume jurisdiction over petitioners. Petitioners' agreement to accept service of process in Scotland [A 9, 17] obviated the need for any further inquiry into the matter. Consent is a sufficient basis for the exercise of a Scottish court's jurisdiction (see Dodson, "United Kingdom," in *Product Liability: A Manual of Practice in Selected Nations* 66 (1981)). Respondent herself has made no suggestion that the Scottish courts would lack jurisdiction over petitioners.

As a matter of law, *amicus'* reasoning from *Hoffman* v. *Blaski* is untenable. The rationale of that decision is limited to construction of the statutory language "where [the action] might have been brought", and does not conform to the common law rule. Justice Frankfurter so demonstrated in dissent. 363 U.S. at 364-65. As the Second Circuit has explained in *Schertenleib* v. *Traum*, 589 F.2d 1156, 1163 (2d Cir. 1978),

> "When the alternative forum is foreign, . . . our courts have difficulty discerning whether a nonresident defendant really would be subject to jurisdiction in the foreign country without his consent. Indeed, the court may receive conflicting expert opinions on this issue. If the defendant consents to suit in the foreign alternate forum, and if that appears to be sufficient under the foreign law, why waste the litigants' money and the court's time in what is essentially an unnecessary and difficult inquiry into the further intricacies of foreign jurisdictional law?"

Accord, *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027, 1029 n.1 (3d Cir. 1980); *Grodinsky* v. *Fairchild Indus., Inc.*, 507 F. Supp. 1245, 1250 n.3 (D. Md. 1981).

cedures offered in the alternative forum [Resp. Br. 8].[17] This was not the approach followed by this Court in *Canada Malting*, where no judgment was rendered on the content of foreign law or inquiry made into the procedures that would be followed in the foreign court. But even if a gloss were to be placed on the requirement of an alternative forum, so that in some case an alternative forum might be found so deficient in law or procedure as to preclude dismissal, this is not such a case. Scots law and the Scottish courts (with which our own law and courts share a heritage and a fundamentally similar jurisprudence) are plainly "adequate" in even the most expansive sense of that word.

Respondent's sole allegation of inadequacy of the Scottish forum is that there she will be "[u]nable to prosecute causes of action for wrongful death and strict products liability, and [will be] limited solely to proving negligence" [Resp. Br. 32-33].[18] In the first place, under

---

[17] Respondent herself at one point frames the requirement of "an adequate remedy and law" as being satisfied if dismissal "will not *completely* deprive [plaintiff] of the rights and advantages he sought" [Resp. Br. 27 (emphasis added)]. The notion that the alternative forum must provide the full compass of relief available in federal court, see, *e.g.*, *id.* 28, simply is without basis, and is flatly inconsistent with this Court's decision in *Canada Malting*, where relegation of the plaintiff to a Canadian court most likely deprived it of half of its potential recovery. 285 U.S. at 418; see Hz. Br. 19 & n.28.

[18] Respondent also claims [Resp. Br. 29 n.20] that Scottish discovery procedures are less satisfactory than those available in the federal courts. We doubt that judicial notice can extend to a telephone conversation of counsel held two years before. Even if it does, we find in the contents of that communication no basic difference from American procedures. In any event, the alleged differences hardly amount to the kind of procedural limitations that would lead to a conclusion that the alternative forum was inadequate. See, *e.g.*, *Dahl* v. *United Technologies Corp.*, 472 F. Supp. 696, 699 (D. Del. 1979), *aff'd*, 632 F.2d 1027 (3d Cir. 1980); *Calavo Growers of California* v. *Generali Belgium*, 632 F.2d

Scots law a decedent's beneficiaries may bring an action for wrongful death [A 18-19]. This is not substantially different from the rule in most jurisdictions in the United States (including Ohio and Pennsylvania), where the action may be brought either by the personal representative or by certain beneficiaries designated by statute,[19] but in either case is brought on behalf of the statutory beneficiaries.[20] The Scots action for wrongful death is governed by the Damages (Scotland) Act 1976

---

963 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 871 (1981); *Grodinsky* v. *Fairchild Indus., Inc.*, 507 F. Supp. 1245, 1250-51 (D. Md. 1981); *Danser* v. *Firestone Tire & Rubber Co.*, 86 F.R.D. 120, 122 (S.D.N.Y. 1980).

[19] The first such statute was England's Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846), which "become the prototype of American wrongful-death statutes . . . ." *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 581 (1974).

[20] Prosser, *Law of Torts* § 127, at 903-904 (4th ed. 1971). The Ohio statute provides that "[a]n action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent." Ohio Rev. Code Ann. § 2125.02 (1976) (Page). The Pennsylvania statute in effect at the time this suit was filed provided for suit by the widow of a decedent, "or if there be no widow, [by] the personal representatives", Pa. Stat. Ann. tit. 12, § 1601 (Purdon), but provided further that the persons entitled to recover damages "shall be the husband, widow, children, or parents of the deceased, and no other relatives". *Id.* § 1602. (These sections have since been repealed and recodified, effective June 27, 1978, as 42 Pa. Cons. Stat. Ann. § 8301 (Purdon).)

The Scottish statute provides that the personal representative may sue only "in respect of patrimonial losses suffered by the estate," but that damages for wrongful death may be sought by the spouse, parent, child, ascendants and descendants (other than parents and children), brothers, sisters, nieces, nephews, uncles and aunts (and their issue), any person accepted by the deceased as a child of his family, and a divorced spouse of the deceased—with the above relationships including relationships of the halfblood, illegitimate children, and stepchildren. Damages (Scotland) Act 1976 §§ 1, 4, 10 (and Schedule 1); see A 18-19.

[A 18], which may be more generous to the relatives of the decedent in terms of permissible damages than are the laws of either Pennsylvania or Ohio.[21]

As for strict liability and negligence, it is far from clear to us that characterizing them as distinct causes of action is of great significance for purposes of deciding a *forum non conveniens* motion.[22] In any event,

---

[21] The Damages (Scotland) Act 1976 allows members of the deceased's "immediate family" (defined as the deceased's spouse, parents, children, and persons accepted by the deceased as his children) to recover damages for both loss of support and loss of society [A 19], the latter comprising "compensation for the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died". Damages (Scotland) Act 1976, § 1(4). See The Law Commission and the Scottish Law Commission, *Liability for Defective Products* 6 (1975) (where death results, a dependent's claim under English law is for pecuniary loss only, "whereas under Scots law there may also be a claim for non-pecuniary loss (*solatium*)"). The latter class of damages, which often may be more substantial than damages for loss of support, see *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 605-609 (1974) (POWELL, J., dissenting), are explicitly prohibited by statute in Ohio, which limits damages to those for "pecuniary injury". Ohio Rev. Code Ann. § 2125.02 (1976) (Page); see *Keaton* v. *Ribbeck*, 58 Ohio St. 2d 443, 391 N.E.2d 307 (1979); *Rubeck* v. *Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978); *Karr* v. *Sixt*, 146 Ohio St. 2d 527, 67 N.E.2d 331 (1946); *Kennedy* v. *Byers*, 107 Ohio St. 90, 140 N.E. 630 (1923). In Pennsylvania the limitation of damages to compensation for "pecuniary loss" has been imposed by the courts, see *Ferne* v. *Chadderton*, 363 Pa. 191, 69 A.2d 104 (1949), which, with the exception of one aberrational decision (*Spangler* v. *Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 153 A.2d 490 (1959)), have not allowed damages for loss of society. See, *e.g.*, *Haddigan* v. *Harkins*, 441 F.2d 844, 852 (3d Cir. 1970); *Soares* v. *McClosky*, 466 F. Supp. 703, 708 (E.D. Pa. 1979); *Prince* v. *Adams*, 229 Pa. Super. 150, 324 A.2d 358 (1974).

[22] After all, a " 'cause of action' may mean one thing for one purpose and something different for another." *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68 (1933) (Cardozo, J.), *quoted in Davis* v. *Passman*, 442 U.S. 228, 237 (1979).

there may be little practical difference between them, in an action against a manufacturer involving allegations of a manufacturing defect, as far as the outcome of the case is concerned. The Scottish Law Commission, which recently convened to consider changes in Scots law on product liability, has suggested that "[i]t may be that proof of a manufacturing defect is nowadays so likely to lead to a finding that the manufacturer . . . failed to take reasonable care, that the duty on the manufacturer is as near to being strict as makes no difference." [23]

In short, respondent's claims of prejudice in prosecuting these claims in Scotland are gossamer-thin. But whether they are or not, a federal court deciding a *forum non conveniens* motion is not obliged to parse the intricacies of foreign law, comparing them in every particular with its own law. It is evident in this case that the differences between local and Scots law in their salient respects fall far short of the differences that this Court was willing to abide in *Canada Malting*. They are less consequential than the differences that have not concerned the lower courts whose decisions countenancing dismissals that would prejudice plaintiffs are cited in our principal brief [Hz. Br. 33-34].[24] There is no risk

---

[23] The Law Commission and the Scottish Law Commission, *supra* note 21, at 34-35. Dean Prosser expressed the same skepticism about the practical differences between strict liability and negligence, in actions against manufacturers as opposed to intermediate sellers, when strict liability first began to gain acceptance in this country. In a seminal article, he wrote: "Where the action is against the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not." Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1114 (1960); see *id.* 1116-17.

[24] And Scots law on these issues seems to compare favorably with what we know from the reported opinions about Norwegian law,

that the relatives of the decedents represented by respondent will be deprived of a remedy or treated unfairly in any way. Their claims will be adjudicated according to the law of their own country, whose courts are available, adequate, and appropriate for this litigation.

CONCLUSION

For the foregoing reasons and those stated in our principal brief, the judgment of the Court of Appeals should be reversed, with directions to affirm the judgment of the District Court dismissing this action on the ground of *forum non conveniens.*

Respectfully submitted,

WARNER W. GARDNER *
NANCY J. BREGSTEIN
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

RONALD C. SCOTT
ADRIAN J. GORDON
KRUSEN EVANS AND BYRNE
500 Public Ledger Building
Philadelphia, Pennsylvania 19106
(215) 923-4400

Attorneys for Petitioner, Hartzell Propeller, Inc.

* Counsel of record

KRUSEN EVANS AND BYRNE
SHEA & GARDNER
Of Counsel

August 14, 1981

---

see *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980), which respondent seems to think affords a remedy "almost identical" to that afforded in the United States [Resp. Br. 31].